

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

FC 2009-005707

04/11/2011

HONORABLE THOMAS L. LECLAIRE

CLERK OF THE COURT

D. Benitez

Deputy

IN RE THE MATTER OF
LEE JOSEPH FOX

LEE JOSEPH FOX
770 E AVE
CORONADO CA 92118

AND

BRENDA ANNE FOX

PAULA J BURNSTEIN

DOCKET-FAMILY COURT CCC
FAMILY COURT SERVICES-CCC

**UNDER ADVISEMENT RULING
DISSOLUTION OF MARRIAGE, CUSTODY, PARENTING TIME,
CHILD SUPPORT, SPOUSAL MAINTENANCE, AND ATTORNEY'S FEES**

The Trial in this matter was held on November 30, 2010. Following the Trial, written closing arguments were filed with the Court on December 17, 2010. Respondent also filed a Motion for an Accelerated Ruling, a Motion to Enforce Rule 69 Agreement, a Motion to Re-Open Evidence, and a Motion for Sanctions. Thereafter, the Court took this matter under advisement. The Court has since reviewed the testimony presented, the exhibits introduced into evidence, the case history and pleadings filed, and the arguments of counsel. Based thereon, the Court finds and orders as follows:

SUMMARY

The parties were married on February 13, 1996. The parties were separated on September 8, 2009. Two children were born of the marriage; Lauren, nearly seven years old, and Hayden, five years old. Petitioner is stationed at the Naval Air Station, North Island, Coronado, CA. Respondent resides in Surprise, Arizona.

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Both parties were enlisted members of the United States Navy. Father obtained his college degree in psychology from University of Arizona. He became an officer in the Navy. He is a Navy pilot. Father was injured in combat in Afghanistan. Father testified that the injury likely precludes him from becoming a commercial pilot upon retirement from the Navy as he currently flies under a military medical waiver. Through most of the litigation, Father has been a lieutenant.¹

Mother was a member of the United States Navy. Mother is no longer a member of the military. She worked in office administration for approximately six years. She also worked for three years in the field of counseling. She attended and graduated from the University of Arizona and holds a Bachelor's degree in psychology. For approximately the last seven years, Respondent was a stay-at-home mother raising the two children.

The parties have agreed to partial resolution of a number of the matters that were being contested in this dissolution. The parties have not resolved parenting time, child support, pension matters, and spousal maintenance.

MARRIAGE

The **COURT FINDS** that at least one of the parties was domiciled in Arizona for at least 90 days prior to the filing of the Petition, that the marriage is irretrievably broken, and there is no chance of reconciliation.

The **COURT FURTHER FINDS** that the minor children of the parties resided in Arizona for more than six months. For purposes of jurisdiction under Arizona law, Arizona is the home state of the minor children, and the Court has jurisdiction, and retains jurisdiction, over the minor children.

The **COURT ORDERS** the dissolution of the marriage and the Court restores each party to the status of a single person.

CUSTODY

The parties concur and stipulate that there should be joint custody of the minor children of the marriage. The parties also agree that Mother shall be designated as the primary residential

¹ Petitioner is an O-3E. This designation, reflected in his Leave and Earning Statement and discussed by expert witness Michael McCarthy, indicates that Petitioner is an officer, a prior enlisted member, and is at the third level of the officer grades, which range from O-1 to O-9.

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parent. The Court has considered the stipulation of the parties and weighed the applicable factors contained in A.R.S. § 25-403(A) and 403.01.

The **COURT FINDS** that despite some degree of animosity between the parties, seemingly centered on financial issues, both parents seem able to set aside those differences on issues related to the children.

The **COURT ORDERS** that the stipulation of the parties regarding joint custody is fair and equitable under the circumstances, is in the best interests of the children, has not been the result of coercion or duress and is accepted and ordered by the Court. The Court concludes that an award of joint legal custody will enhance opportunities for meaningful involvement with each child by each parent.

Therefore, **IT IS ORDERED** as follows:

- A. The parties are awarded joint legal custody of the minor children, Lauren Fox ((DOB: 3/20/2004) and Hayden Fox (DOB: 12/07/2005), with Mother/Petitioner receiving primary physical custody.
- B. Each parent is entitled to full and unrestricted access to all medical, dental, prescription and health related records of the children and may secure information from and consult with all health care professionals involved with the minor children. Each party shall keep the other parent informed of the names, addresses and telephone numbers of all health care providers of the children.
- C. Each parent is entitled to full and unrestricted access to all school records, teachers and school officials involved in the children's schooling.
- D. In the event of any emergency or urgent circumstance involving a child or both children, the other parent shall be notified as soon as is reasonably possible.
- E. Each parent shall have the right to attend and participate in school, extra-curricular, conference, organized activity or other similar event in which parents are routinely invited or permitted to attend.
- F. Each parent shall keep the other apprised of his/her home address, home telephone number, employer and address, work telephone number and, if applicable, cellular telephone number and e-mail address.
- G. It is in the furtherance of the children's best interests for the parents to confer and for the views of each parent to be considered. There shall be communication between the parents to address common and more significant issues. The parties

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have agreed that Mother may make routine day-to-day decisions affecting the children without consultation with Father.

- H. It is anticipated that parental decisions shall be required for major issues in raising the children and in meeting their on-going needs. If/when they arise, the parents shall address the issues. Each shall give good faith consideration to the views of the other. If the decision involves medical or schooling issues, the parties may further elect, but are not required, to seek input from treating physicians or educators. Both parents shall be provided with such input. Major decisions must be reached by mutual agreement.

PARENTING TIME

Each party has provided the Court with a parenting plan. The Court has considered both plans in the context of the statutory requirements, the testimony presented at trial, the pleadings previously filed, and the arguments of counsel.

In considering an appropriate plan, the Court focused on approving a parenting plan that is generally workable to the parties and maximizes parenting time of each parent. The Court has considered the issues surrounding Hayden, with Father arguing that Hayden is capable of spending long periods with Father and Mother arguing that Hayden is not ready for long periods of separation from Mother. Mother also testified that Hayden had difficulty being away from Mother last summer and accused Father of minimizing Hayden's concerns.

Hayden is six years old. While young, he is old enough to spend considerable time away from Mother. The Court has no doubt that at times Hayden may feel anxious at being away from Mother. There was no testimony or evidence presented that suggests that the level of discomfort experienced by Haden is exceptional rather than routine.² The testimony was clear that Father, a career member of the United States Navy, has traveled considerably during the children's lives. Each child will have to adjust to life after the divorce where each child will be separated for a period of time from the other parent. The periods of separation contemplated here are not so great as to create an unusual degree of separation anxiety.

Regular Parenting Time

² The parties disagree whether Hayden experienced "separation anxiety" while with Father over the summer of 2010. The Court does not need to resolve this conflict as the Court applies common experience to the fact that a young child would miss the parent who is not present. Neither side presented any evidence suggesting that Hayden's experience was out of the norm.

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Father shall have parenting time with the minor children every other weekend, when able, commencing February 18, 2011. Following this weekend, Father shall notify mother five days in advance of his intent to exercise the next weekend parenting time. The notice may be made by any means that assures the notice is received.

Weekends commence after school on Friday and end on Sunday at 6:00 p.m.

School Breaks

Father shall have parenting time with the minor children on three-day weekends resulting from a holiday or school break from school when they occur on Father's regular parenting time weekend.

Mother and Father shall have parenting time with the minor child for one half of the fall/winter (if different than Christmas) and spring break from school. Mother's parenting time during winter break shall be the first half of winter break in even-numbered years and the second half of winter break in odd-numbered years. Mother's parenting time during spring break shall be the first half of spring break in even-numbered years and the second half of spring break in odd-numbered years. The dividing time shall be Wednesday at 8:00 a.m. on breaks of one week. If the break is two weeks, the dividing time shall be at 8:00 a.m. the second Sunday after school gets out. In the event the winter break is the Christmas holiday period, the holiday schedule will apply.

Summer Vacation

Father shall have parenting time with the minor children starting on the second Saturday at 8:00 a.m. after school is completed for the summer break. Father shall return the children to Mother on the Sunday at 6:00 p.m. one week before school resumes after the summer break. Father shall be solely responsible for the costs of transportation for summer break vacation exercising his vacation time.

Mother may have parenting vacation time for up to two consecutive weeks with the children between the third and seventh week of summer vacation. Mother shall be solely responsible for the costs of transportation for summer break vacation exercising her vacation time and will be required to pick up and return the children to and from Father's residence.

Holiday Schedule

For holidays, the parties shall utilize the following schedule which shall take priority over the regular or summer access schedule:

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- a. Christmas shall be divided into two segments. The first shall begin after school releases for the Christmas break and continue until December 25th at 10:00 a.m. The second segment shall begin on December 25th at 10:00 a.m. and continue until 6:00 p.m. on the night before school commences in January. In each even-numbered year, Father shall be entitled to the first segment and Mother shall be entitled to the second segment. In each odd-numbered year Mother shall have the first segment and Father shall have the second segment.
- b. Thanksgiving shall be alternated each year. It shall begin when school releases for Thanksgiving and shall continue until Sunday at 6:00 p.m. In even-numbered years, Mother shall be entitled Thanksgiving and Father entitled to Thanksgiving in odd-numbered years.
- c. Children's birthdays: In each odd-numbered year, Mother shall have parenting time with the minor children on each child's birthday. In each even-numbered year, Father shall have parenting time with the minor children on each child's birthday.
- d. Each year, the children shall be with Mother on Mother's Day from 9:00 a.m. until 6:00 p.m. and with Father on Father's Day from 9:00 a.m. until 6:00 p.m. unless the day falls on a weekend, in which case the parent shall have parenting time for the entire weekend.
- e. The children shall be with Mother for Easter weekend in even-numbered years from after school on Friday until 6:00 p.m. on Sunday and with Father for this same time period in odd-numbered years.

Exchange of Children

The distance between the two homes is substantial. The cost of transporting the children will be excessive if borne by one party. The Court, therefore, requires the cost of transporting the children between the two homes be divided equally between the parties. The parties are directed to work together to minimize the costs of transportation and impact on the children. Further, the Court is not requiring, but encourages the parties to meet between the two homes when the children are being transported by automobile.

CHILD SUPPORT

The Court has calculated child support pursuant to the Maricopa County Child Support Guidelines. The Court's worksheet is attached to this Order.

Two calculation areas appear to be in dispute: (1) Father's parenting time, and (2) Mother's attributable wages. The Court determined that Father's parenting time will be 93 days per year for

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calculation purposes. The Court arrived at this number by calculating monthly parenting time (less 10 weeks in summer, 2 weeks of school breaks, 2 weeks of holidays), which the Court found to be 47.5 days and discounted 50% because of travel requirements, holiday time of 10 days, school break time of 10 days, and 49 days of summer break.

The Court is concerned about mother's lack of pursuit of a job since the separation and her lack of vigilance in her pursuit of her Master's degree.³ The Court does not concur with Mother that she is only able to obtain minimum wage employment. Mother is a college graduate from a prestigious university. She holds the same degree that Father holds. Also, Mother's employment goal is significantly self-limited. She seeks only to be employed as a counselor, a position for which she needs a Master's degree to obtain certification in the state of Arizona. Thus, the Court finds that Mother's inability to obtain employment results from a self-imposed requirement that she only obtain employment in a specialty for which she is not now qualified. The Court is unaware of any legal authority that supports Mother's position, which amounts to a self-disqualification for present employment.

Instead, the Court concurs with Father's rationale contained in the Joint Pretrial Statement (page 7). Mother is capable of earning more than minimum wage based on her prior work history, her experience, her training, and her education. The Court, therefore, attributes gross monthly wages of \$2,240 (\$14.00 per hour) to Mother, the low end of the wage scale in her skill set.⁴

IT IS ORDERED that Father shall pay to Mother as and for child support the sum of 928.39 per month, plus \$5.00 per month as and for the Clearinghouse Handling Fee for a total of \$933.39, payable through the Support Payment Clearinghouse on the 1st day of each month, effective as of , by Wage Assignment per the attached instructions.

LET THE RECORD REFLECT an Order of Assignment is initiated electronically by the above-named deputy clerk.

REAL PROPERTY

The Court adopts the agreement of the parties contained in paragraphs 2 and 3 of the Joint Pretrial Statement.

³ Mother testified that it was difficult for her to attend school balancing the needs of the children. The Court acknowledges the difficulties, but notes that the period between the separation and now was a significant opportunity to pursue an advanced degree, obtain on-the-job training, seek employment, and gain job experience. It appears to the Court that Respondent voluntarily failed to take advantage of that opportunity. Petitioner, who testified that he encouraged Respondent repeatedly to obtain employment, should not be held financially responsible for the choices made by Respondent.

⁴ Based upon the information provided by Petitioner, which the Court credits.

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COMMUNITY DEBTS

The Court adopts the agreement of the parties contained in paragraph 4 of the Joint Pretrial Statement.

PERSONAL PROPERTY

The Court adopts the agreement of the parties contained in paragraph 5 of the Joint Pretrial Statement.

TAX RETURNS

The Court adopts the agreement of the parties contained in paragraph 6 of the Joint Pretrial Statement.

EQUALIZATION PAYMENTS

The Court adopts the agreement of the parties contained in paragraph 7 of the Joint Pretrial Statement.

CHILDREN'S COLLEGE FUNDS

The Court adopts the agreement of the parties contained in paragraph 8 of the Joint Pretrial Statement.

VANGUARD ACCOUNT

The Court adopts the agreement of the parties contained in paragraph 9 of the Joint Pretrial Statement.

PETITIONER'S MILITARY RETIREMENT

The Court adopts the agreement of the parties contained in paragraph 10 of the Joint Pretrial Statement.

WAIVER OF CLAIMS

The Court adopts the agreement of the parties contained in paragraph 11 of the Joint Pretrial Statement.

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RESPONDENT'S RESIDUAL MILITARY BENEFITS

The Court adopts the agreement of the parties contained in paragraph 12 of the Joint Pretrial Statement.

SPOUSAL MAINTENANCE

Mother seeks spousal maintenance from Father in the amount of \$3,000 per month for two years and \$2,000 per month for an additional two years. Father does not seek spousal maintenance from Mother. The determination of spousal maintenance is controlled by A.R.S. Section 25-319. The threshold question is entitlement, which is controlled by subsection (A) of the statute. It provides as follows:

In a proceeding for dissolution of marriage or legal separation, or a proceeding for maintenance following dissolution of the marriage by a court that lacked personal jurisdiction over the absent spouse, the Court may grant a maintenance order for either spouse for any of the following reasons if it finds that the spouse seeking maintenance:

- 1. Lacks sufficient property, including property apportioned to the spouse, to provide for that spouse's reasonable needs.*
- 2. Is unable to be self-sufficient through appropriate employment or is the custodian of a child whose age or condition is such that the custodian should not be required to seek employment outside the home or lacks earning ability in the labor market adequate to be self-sufficient.*
- 3. Contributed to the educational opportunities of the other spouse.*
- 4. Had a marriage of long duration and is of an age that may preclude the possibility of gaining employment adequate to be self-sufficient.*

The **COURT FINDS** as follows:

- 1. Lacks sufficient property, including property apportioned to the spouse, to provide for that spouse's reasonable needs.*

The Court finds that Mother will receive sufficient property to provide for her reasonable needs. Pursuant to the Decree, Mother will receive the marital residence, which is a five

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bedroom home. The monthly mortgage on that property is \$950, a reasonable amount for the size of the home. Additionally, Mother will receive a 2004 Lincoln Navigator free from any encumbrances. Mother is receiving an equalization payment in the amount of \$30,000 with payments in December 2010 and June 2011. Mother will receive the Vanguard account as her sole and separate property. Mother will receive a significant portion of Father's military retirement in approximately four years. As a result, Mother will receive retirement payments starting at age 42, which will continue for the remainder of her life.⁵

2. *Is unable to be self-sufficient through appropriate employment or is the custodian of a child whose age or condition is such that the custodian should not be required to seek employment outside the home or lacks earning ability in the labor market adequate to be self-sufficient.*

As the Court indicated above, Mother has the capability of obtaining employment at a compensation level in excess of minimum wage. She is a college graduate and has completed some Master's degree courses. While Mother would prefer to obtain employment as a counselor, those aspirational goals do not preclude current employment.⁶ Father proffered and the Court concurs that Mother should be attributed income at the low end of the applicable wage scale, which equates to slightly more than \$14.00 per hour or \$2,240 per month. *See* Joint Pretrial Statement, paragraph B, page 7. Her attributed wage earnings coupled with the assets she is receiving upon dissolution, not including child support, and her future interest in Father's retirement indicates that she is able to be self-sufficient. The Court finds further that the children are of school age, and they do not preclude Mother from obtaining appropriate employment.

3. *Contributed to the educational opportunities of the other spouse.*

Mother did not contribute to the educational opportunities of Father. Father attended college pursuant to a program paid by the United States Navy. Instead, Mother attended college using, in part, community assets for support. This factor is inapplicable to this marital community because Father is not seeking spousal maintenance.

⁵ Husband testified that Wife received \$53,000 in temporary spousal maintenance. Husband also testified that his income will drop when he retires from the military because he will no longer be qualified to pursue the career for which he is trained and will be required to retrain for another career.

⁶ Mother's desire to become a certified counselor is not precluded by a requirement that she obtain employment. While obtaining an advanced degree will undoubtedly be difficult, many people are able to obtain such degrees while working full-time. Further, the Court remains concerned about Mother's activities to date. The parties separated in September 2009. Since that time, Father has either been paying most of the family's expenses or paying temporary spousal maintenance. Mother has shown little initiative in obtaining employment over that period. Further, Mother has not pursued her course work with much diligence either.

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4. *Had a marriage of long duration and is of an age that may preclude the possibility of gaining employment adequate to be self-sufficient.*

The marriage was not of long duration being thirteen years and seven months long. Mother is 38 years old. She is a college graduate and has completed some Master's degree courses. Her age does not preclude her from obtaining appropriate and adequate employment.

Based upon the evidence presented at trial and after considering the factors set forth in A.R.S. §25-319(A), the Court finds that Wife does not qualify for spousal maintenance under the statute.

Therefore, Wife's request for spousal maintenance is **DENIED**.

QDRO

In a post-trial motion, submitted February 15, 2011, Petitioner has requested that the Court remove Michael McCarthy as the attorney to prepare the QDRO. Petitioner also seeks to have the Court issue an Order on the manner of retirement division. Finally, Petitioner asks the Court to bifurcate the QDRO issue from the remainder of the dissolution and to order the dissolution. That issue has been addressed by a separate minute entry.

IT IS ORDERED that the parties shall cause to be prepared and submitted to the Court a Qualified Domestic Relations Order (QDRO) to divide Petitioner's military retirement. The community portion of the accounts, as well as the cost of the QDRO preparation, shall be split equally.

ATTORNEY'S FEES

The Court is currently unable to determine whether the final equalization of debt and assets constituting the financial resources of the parties creates an imbalance to a sufficient degree to permit the award of attorney's fees under A.R.S. § 25-324.

With respect to the reasonableness or unreasonableness of the parties, the Court finds that both parties have engaged in conduct during the litigation that is contrary to the Orders of the Court and have, at times, been calculative, litigious, provocative, and acted contrary to a reasonable resolution of this matter. In short, both parties have unclean hands and no party is entitled to attorney's fees on the basis of reasonableness.

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Upon a final determination of all of the value of the assets in the marital estate and the appropriate distribution, the Court will determine if there is a financial imbalance between the parties that would support an award of attorney's fees under A.R.S. § 25-324.

The Court **DENIES** Respondent's Motions to Re-Open and to Enforce the Rule 69 Agreement and for Fees.

The Court has reviewed Respondent's Motion to Compel Petitioner to Secure Insurance. The Court has reviewed the cases cited by Respondent. Those cases are inapplicable as they pertain to allocation of existing policies within the marital community. The Court, in its discretion, declines to compel Petitioner to obtain life insurance on himself for the benefit of Respondent.

The Court **DENIES** Respondent's filing of additional documents and evidence following the trial. The Court has considered the argument filed by Respondent.

The Court **DENIES** Respondent's Motion for the Court to hold Petitioner in contempt. The Court finds no willful and contumacious conduct on the part of Petitioner.

FILED: Exhibit Worksheet

IT IS FURTHER ORDERED signing this minute entry as a formal order of this Court pursuant to Rule 81(D), Arizona Rules of Family Law Procedure.

/s/ Honorable Thomas L. LeClaire

THOMAS L. LeCLAIRE
SUPERIOR COURT JUDGE

This case is eFiling eligible: <http://www.clerkofcourt.maricopa.gov/efiling/default.asp>. Attorneys are encouraged to review Supreme Court Administrative Orders 2010-117 and 2011-10 to determine their mandatory participation in eFiling through AZTurboCourt.

All parties representing themselves must keep the Court updated with address changes. A form may be downloaded at: <http://www.superiorcourt.maricopa.gov/SuperiorCourt/Self-ServiceCenter>.